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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JAMES ANTHONY BILLER, an) Case No. C 10-05731 SC
individual,)
Plaintiff,) PLAINTIFF'S MOTION IN
vs.) LIMINE NO. 8
TERILYN, its engines, tackle, equipment,) MOTION IN LIMINE TO
furnishings, and machinery, *in rem*,) EXCLUDE EXPERT'S
WESTAR MARINE SERVICES, a business) TESTIMONY AS TO
entity of unknown form, *in personam*,) PHOTOGRAPH;
Defendants.) DECLARATION OF CORY
BIRNBERG IN SUPPORT OF
MOTION IN LIMINE

Plaintiff hereby moves this Court for an order excluding any testimony (either oral or written) proffered by defendant's expert, Captain Johnson, as to a photograph referred to in his report and his supposition there from.

INTRODUCTION

In his expert report Captain Johnson hypothesizes that, if plaintiff was pulling on a line that Captain Johnson believes is depicted in a photograph then plaintiff “contributed” to his injury. Declaration of Cory Birnberg in Support of Motion *in Limine* (“Birnberg Declaration”) and exhibits attached thereto. Captain Johnson goes on to say what he believes the photo “seems to show”. Captain Johnson has to make such speculative

1 observations because **he was not there** when the photograph was taken and he cites to no
2 testimony identifying what was going on in that photograph. For all Captain Johnson
3 knows, the photograph could be the result of one of those side conversations that occurs
4 during an inspection that is unrelated to the case at hand or perhaps plaintiff was
5 demonstrating what he did not do. The photograph speaks for itself, in that it merely shows
6 plaintiff with his hands in a particular position. Attaching a speculative meaning constitutes
7 inadmissible hearsay. Any inferences drawn from this photograph are pure speculation and
8 guesswork; as such it is inappropriate for expert testimony.

10 **ARGUMENT**

11 An expert is required to provide a sound basis for his opinion and his testimony
12 must be based on reliable data. *Daubert v. Merrell Dow* (1993) 509 US 579, 593; FRCP
13 Rule 26(a). Although an absolute certainty is not required, an expert's opinion must be
14 based on facts "to express a reasonably accurate conclusion as opposed to conjecture or
15 speculation. [citation omitted]". *Kieffer v. Weston Land, Inc.*, 90 F.3d 1496, 1499 (10th Cir.
16 1996) [expert not permitted to testify as to an injury which a defect could have caused
17 where the expert had no reasonable grounds for the belief that such a defect existed when
18 the injury occurred]. The purpose of expert opinions and testimony is to assist the trier of
19 fact. FRE Rule 702. Speculation and terms like "seems to show" is not assistance to the trier
20 of fact. "A liability expert is only helpful to the fact finder if he is able to establish such an
21 element of the claim through visual inspection, independent research, testing, and
22 knowledge." *Clark v. Takata Corp.* 192 F.3d 750, 757 (7th Cir., 1999). An expert must take
23 steps to verify the accuracy of the facts; the failure to do so can result in their testimony
24 being excluded. Such unverified facts do not assist the tier of fact. *U.S. Salt, Inc. v. Broken*
25 *Arrow, Inc.* 2007 U.S. Dist. LEXIS 43376, 5-6 (D. MN 2008).

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1 Captain Johnson cannot establish his claims as to liability because he was not
2 present when the photograph was taken and has no independent knowledge of what
3 circumstance led to the photograph. He also did not indicate that he had done any steps to
4 independently verify his “facts” (which, of course, would be difficult to do, as the “facts”
5 consist of his imagination as to what is depicted in the photograph). Moreover, Captain
6 Johnson is not qualified to offer an interpretation of the photograph. “Courts must act as
7 gatekeepers to ensure that all expert testimony admitted at trial is both relevant and reliable.
8 Dodge v. Cotter Corp., 328 F.3d 1212, 1221 (10th Cir. 2003). The proponent of an expert
9 bears the burden of demonstrating that the requisite admissibility requirements are met by a
10 preponderance of the evidence. Fed. R. Evid. 702 advisory committee's note.” *Ponca Tribe*
11 *of Indians of Okla. v. Cont'l Carbon Co.*, 2009 U.S. Dist. LEXIS 117418 (W.D. Okla.
12 2009).

15 Furthermore, by adopting his own interpretation of the photograph, Captain Johnson
16 is attempting to present inadmissible hearsay before the jury. While FRE Rule 703 permits
17 an expert to render opinions based on hearsay, he can only do so if that hearsay is of the
18 type reasonably relied upon by experts. A personal theory of what a photograph is showing
19 is not the type reasonably relied upon by experts. Furthermore, even if the hearsay was
20 reliable it cannot be offered to prove the truth of the matter stated therein. *Heishman v.*
21 *Ayers* 621 F.3d 1030, 1040-1043 (9th Cir., 2010); *Paddock v. Dave Christensen, Inc.* 745
22 F.2d 1254, 1261-62 (9th Cir., 1984) [“Rule 703 merely permits such hearsay, or other
23 inadmissible evidence, upon which an expert relies, to be admitted to explain the basis of
24 the expert's opinion. It does not allow the admission of the reports to establish the truth of
25 what they assert.”].

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28 Motion in Limine No. 8

Motion in Limine to Exclude Expert's Testimony as to Photograph; Declaration of Cory Birnberg in Support of Motion in Limine
Case No.: C 10-05731 SC

Here, masquerading as Captain Johnson's expert opinion is an unfounded depiction of a photograph which is presented in a highly prejudicial manner. Where the probative value of evidence is substantially outweighed by unfair prejudice, the Court can exclude that evidence. FRE Rule 403. Where evidence has an "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one" it is unfairly prejudicial. Advisory Committee Notes to Federal Rule of Evidence 403.

Captain Johnson's testimony concerning his purely speculative opinion as to how the accident might have happened based on his own interpretation of what was being demonstrated in a photograph where he was not present should be excluded.

Dated: August 21, 2012

BIRNBERG & ASSOCIATES

By: /s/ Cory A. Birnberg
Attorneys for Plaintiff

**DECLARATION OF CORY BIRNBERG
IN SUPPORT OF MOTION *IN LIMINE***

I, Cory Birnberg, declare as follows:

1. I am an attorney at law licensed to practice in the state of California and before this Court. I make this declaration pursuant to my own personal knowledge and as to those matters stated upon information and belief, believe them to be true.

2. Attached hereto, as Exhibit A, is a true and correct copy of selected pages from Captain Johnson's report referencing the photograph.

3. Attached hereto, as Exhibit B, is a copy of the photograph I believe Captain Johnson is referring to.

I declare pursuant to 28 U.S.C. §1746(b) that the foregoing is true and correct.

Executed this day of 21st of August 2012 at San Francisco, California,

/s/ Cory A. Birnberg